United States Department of Labor
Employees' Compensation Appeals Board

T.J., Appellant	)	
and	)	**Docket No. 18-1477**
	)	**Issued: April 4, 2019**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, LOS ANGELES INTERNATIONAL AIRPORT, Los Angeles, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 24, 2018 appellant filed a timely appeal from a May 17, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the May 17, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to modify a January 14, 2016 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 17, 2003 appellant, then a 25-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that he injured his back on March 19, 2003 helping a passenger place luggage on a table. He stopped work on March 24, 2003. Following a brief return to work on May 1, 2003, appellant filed a notice of recurrence (Form CA-2a) indicating that he had stopped work on April 27, 2003 because his back pain continued. On August 8, 2003 OWCP accepted the claim for lumbosacral strain. It paid appellant wage-loss compensation on the supplemental rolls as of May 25, 2003 and on the periodic rolls as of August 10, 2003.

In June 2003, appellant came under the care of Dr. H. Vincent Mitzelfelt, Board-certified in occupational medicine, who provided monthly form progress reports and advised that appellant should remain off work. Dr. Ali Berenji, an orthopedic surgeon, performed authorized discectomy at L5-S1 on May 26, 2004.

In April 2015, OWCP referred appellant to Dr. Richard A. Rogachefsky, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a May 13, 2015 report, Dr. Rogachefsky noted the history of injury, his review of the medical record and appellant's complaint of radiating low back pain. He described physical examination findings, recommended an updated magnetic resonance imaging (MRI) scan, and indicated that appellant was capable of working modified duty. In a supplemental report dated June 3, 2015, Dr. Rogachefsky noted that a lumbar MRI scan demonstrated an L5 compression fracture. He concluded that appellant was no longer totally disabled and was capable of employment with physical limitations of no climbing, bending, or stooping. Lifting, pushing, and pulling were limited to no greater than 10 pounds, and walking to 25 minutes. Appellant was to take 15-minute breaks.

Appellant, who had been referred for vocational rehabilitation services in August 2011,[4] was again referred in August 5, 2015 for updates on job classifications. A vocational rehabilitation specialist provided an update on a surveillance-system monitor position on August 19, 2015.

[3] Docket No. 16-1473 (issued February 7, 2017).

[4] Appellant's vocational rehabilitation services filed was closed on July 25, 2012.

By decision dated January 14, 2016, OWCP reduced appellant's wage-loss compensation based on his capacity to earn wages as a surveillance systems monitor, effective that day. By utilizing the *Shadrick* formula,[5] it found that he had a 21 percent LWEC.

On February 12, 2016 appellant requested reconsideration, asserting that the medical evidence established that he was totally disabled.

Appellant also submitted reports dated February 22 and April 4, 2016 in which Dr. Mitzelfelt repeated appellant's complaints of constant and increasing radiating low back pain. Dr. Mitzelfelt described examination findings and advised that appellant could work for four hours per day at most with occasional lifting of 20 pounds.

By decision dated May 10, 2016, OWCP denied modification of the January 14, 2016 LWEC determination. Appellant thereafter filed an appeal with the Board. By decision dated January 26, 2017, the Board found that he had not submitted sufficient medical evidence to establish a material change in the nature and extent of his injury-related conditions and, therefore, had not met his burden of proof to establish that the January 14, 2016 LWEC determination should be modified. The Board affirmed the May 10 and January 14, 2016 OWCP decisions.[6]

On July 27, 2017 appellant requested reconsideration. He asserted that he was totally disabled and could not work.

During the pendency of appellant's appeal with the Board, Dr. Mitzelfelt had submitted reports, dated May 9 and July 18, 2016, in which he described appellant's medical management and reiterated appellant's physical restrictions. On January 5, 2017 Dr. Jason Groomer, an osteopath, assumed appellant's treatment and submitted monthly reports.

Dr. Kourosh Kevin Shamlou, a Board-certified orthopedic surgeon, evaluated appellant on March 8, 2017. He noted chief complaints of low back pain and bilateral leg pain, and described the employment injury and appellant's medication regimen. Dr. Shamlou indicated that appellant's gait was normal. Lumbosacral range of motion was limited and painful and there was tenderness on examination of the lumbosacral spine. Straight leg raises produced pain. Lower extremity neuromotor and sensory examinations were within normal limits. Dr. Shamlou diagnosed L5-S1 discogenic back pain with radiculopathy. He opined that, given the fact that appellant took narcotics and muscle relaxants on a daily basis to be somewhat functional, he was not employable because of his low back condition.

Dr. Malihel Massih, a Board-certified physiatrist, performed a lower extremity electromyograph (EMG) and nerve conduction velocity (NCV) study on May 25, 2017. She advised that the study was abnormal and could suggest subacute mild L5-S1 radiculopathy in bilateral lower extremities. Dr. Massih performed a second EMG/NCV study on July 7, 2017

[5] *Albert C. Shadrick*, 5 ECAB 376 (1953). The LWEC was based on information provided by Richard D. Hunt, a vocational rehabilitation counselor and the medical opinion of Dr. Rogachefsky.

[6] *Supra* note 3.

limited to the right tibialis anterior muscle. She reported that appellant's clinical presentation had not changed and was consistent with right L5 and S1 nerve root pathology.

By decision dated November 14, 2017, OWCP found the medical evidence submitted insufficient to modify the January 14, 2016 LWEC determination.

Appellant again requested reconsideration on February 16, 2018 claiming that he was totally disabled.

In support of his reconsideration request, appellant submitted a January 13, 2017 MRI scan of the lumbar spine that demonstrated a disc bulge with severe right and moderate left neural foraminal narrowing at L5-S1 and a disc protrusion/extrusion at L4-5 with moderate right foraminal narrowing.

Dr. Shamlou provided a December 6, 2017 report in which he noted appellant's complaints of radiating low back pain with weakness and numbness in both legs. He noted January 2017 MRI scan findings, described appellant's physical examination, and diagnosed L4-5, L5-S1 spondylosis with discogenic back pain, disc herniation per MRI scan, and radiculopathy. Dr. Shamlou indicated that appellant was limited to less than 15 minutes of sitting/standing/walking at one time. He advised that appellant took up to six narcotics and muscle relaxants per day in order to function and that those medications interfered with his ability to comprehend or operate machinery. Dr. Shamlou concluded that appellant was not employable.

In a January 11, 2018 report, Dr. Groomer described the physical activities of the surveillance system monitor position. He noted Dr. Shamlou's description of appellant's restrictions. Dr. Groomer wrote that he would interpret Dr. Shamlou's finding to mean that, in appellant's capacity as a security operative for the employing establishment, he needed to be able to respond and comprehend subtle cues while surveilling the public, recognize subtle findings on x-ray machines, be able to comprehend instructions, and be required to rapidly respond to those instructions and perform job duties potentially under stressful conditions. He also noted that appellant would have to drive daily to and from his work location. Dr. Groomer concurred with Dr. Shamlou's conclusion that appellant was not employable in any capacity, finding him permanently and totally disabled. He continued to submit monthly reports in which he described appellant's medical management.

By decision dated May 17, 2018, OWCP denied modification of the January 14, 2016 LWEC determination. It found that the reports from Dr. Groomer and Dr. Shamlou were insufficient to modify the LWEC determination, noting that neither physician had accurately described the duties of the surveillance system monitor position on which the determination had been based.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is

entitled to compensation computed on LWEC.[7] An LWEC determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected/constructed position, represents a claimant's ability to earn wages.[8]

Compensation payments are based on these determinations, and OWCP's finding remains undisturbed until properly modified.[9] Modification of an LWEC determination is unwarranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.[10] The burden of proof is on the party seeking modification.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to modify the January 14, 2016 LWEC determination.[12]

Appellant asserts on appeal that the accepted conditions materially changed such that he is totally disabled. He did not assert that the January 14, 2016 LWEC determination was erroneous or indicate that he had been retrained or otherwise vocationally rehabilitated.

In its January 26, 2017 decision, the Board reviewed all evidence submitted prior to OWCP's May 10, 2016 decision. The Board's review of the previously submitted evidence of record is *res judicata* absent any further review by OWCP under section 8128(a) and; therefore, the prior evidence need not be addressed again in this decision.[13]

In support of his request to modify the LWEC determination, appellant submitted a May 25, 2017 report in which Dr. Massih reported EMG/NCV study findings. Dr. Massih, however, did not comment on his ability to perform the surveillance-system monitor position and thus her report lacks probative value relative to the issue of wage-earning capacity.[14]

Appellant also submitted a series of report from Dr. Mitzelfelt and then Dr. Groomer dated from May 9, 2016 to May 1, 2018. The majority of these reports described her medical management, but did not discuss his work capacity. These reports did not establish a material

[7] 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see T.H.*, Docket No. 18-0704 (issued September 6, 2018).

[8] *See W.G.*, Docket No. 18-0374 (issued August 28, 2018).

[9] *J.H.*, Docket No. 18-0535 (issued December 31, 2018); *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

[10] 20 C.F.R. § 10.511; *see J.H., id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

[11] *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[12] 5 U.S.C. § 8114(d).

[13] *E.C.*, Docket No. 17-1765 (issued January 24, 2018); *E.L.*, Docket No. 16-0635 (issued November 7, 2016). *See A.T.*, Docket No. 16-0738 (issued May 19, 2016).

[14] *See C.C.*, Docket No. 18-1127 (issued January 29, 2019).

worsening of the accepted conditions and did not provide a rationalized opinion explaining how the accepted conditions prevented him from performing the duties of the selected position.[15] In his January 11, 2018 report, Dr. Groomer described the physical activities of a security agent with the employing establishment; however, he did not discuss the requirements of the sedentary surveillance systems monitor position on which the LWEC was based.[16] While he noted that appellant would have to drive daily to and from his work location, this is irrelevant to the modification issue as he lives in the same large metropolitan city in which the employing establishment is located and public transportation is available. Dr. Groomer's opinion is, therefore, insufficient to establish that appellant could not perform the position of surveillance systems monitor.[17]

Dr. Shamlou opined that because appellant took up to six narcotics and muscle relaxants on a daily basis to be able to function, he was not employable, noting that the medications interfered with his ability to comprehend or operate machinery. The accepted conditions in this case are lumbosacral strain and displaced lumbar intervertebral disc. Dr. Shamlou did not acknowledge the accepted conditions or explain why appellant's heavy medication regimen was due to a worsening of these accepted conditions. Furthermore, he did not mention the surveillance system monitor position or opine as to whether appellant could perform the position. Instead, Dr. Shamlou merely advised that appellant could not work. The Board finds his opinion insufficient to establish a material change in the injury-related conditions such that the January 14, 2016 LWEC determination should be modified.[18]

It is appellant's burden of proof to establish that modification of the January 14, 2016 LWEC determination was warranted.[19] The Board finds that he has failed to submit a rationalized medical opinion, based on a complete background, establishing a material change in his employment-related condition which prevented him from performing the surveillance systems monitor position. As such, appellant, has not met his burden of proof in this case.[20]

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that the January 14, 2016 LWEC determination should be modified.

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id*.

[19] *J.A.*, *supra* note 11.

[20] *See N.M.*, Docket No. 18-1244 (issued March 4, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board